Yue Hua Chen v. Ashcroft, 02-73187

CLIFTON, Circuit Judge, concurring in part and dissenting in part:

I agree with my colleagues that the petition should be granted and this case should be remanded to the BIA. On remand, however, the BIA should have the opportunity to clarify its conclusions with respect to Chen's credibility; it should not be required to treat her credibility as established.

The adverse credibility determination regarding Chen's testimony was originally made by the immigration judge ("IJ") and was, in large part, expressly based upon the IJ's observations of her demeanor while testifying. Credibility determinations that are based on an applicant's demeanor are accorded "special deference." *Singh-Kaur v. INS*, 183 F.3d 1147, 1151 (9th Cir. 1999). That is logical, because the IJ has the advantage on us and on the BIA with regard to evaluating Chen's testimony – the IJ actually observed the petitioner while she testified. Such deference is not unique to the immigration context. It is, rather, routine in our appellate review of factual findings made by triers of fact.

The majority disregards that ground for the adverse credibility determination solely because it was not expressly mentioned by the BIA in its decision. The BIA discussed some specific testimonial inconsistencies which it identified in Chen's testimony as supporting the IJ's adverse credibility

determination. Nothing in the BIA's discussion suggested, however, that the BIA affirmatively disbelieved any other ground identified by the IJ in support of the IJ's adverse credibility determination. Rather, the BIA concluded by saying that it was "in agreement with the decision of the Immigration Judge" and explicitly affirming the IJ's decision "based upon and for the reasons set forth therein." In prior cases, the language "based upon and for the reasons set forth" has been deemed sufficient for the BIA to adopt the IJ's findings. *See, e.g., Al-Harbi v. INS,* 242 F.3d 882, 887 (9th Cir. 2001); *Osorio v. INS*, 99 F.3d 928, 931 (9th Cir. 1996); *Alaelua v. INS*, 45 F.3d 1379, 1381 (9th Cir. 1995).

There is no logical reason to ignore that language in this case. The majority cites the BIA's use of the transitional word "[t]herefore," as justification for doing so, but its inference is not persuasive. The words "in agreement with the decision of the Immigration Judge" and "for the reasons set forth therein" are clear. There would have been no reason for the BIA to include those words if it intended to base its decision exclusively on the grounds it had already discussed in its own decision. Those words mean just what they say – that the BIA relied as well on the other reasons set forth in the IJ's decision.

Substantively, it is implausible to conclude that the BIA rejected the IJ's demeanor finding. It is far more likely that the BIA intended to incorporate that

finding as part of the "reasons set forth" in the IJ's decision, but did not discuss it separately because it was not in a position to observe Chen's demeanor and thus had nothing to add. The majority does not identify anything incorrect or unreliable about the IJ's demeanor finding. It is wrong to disregard it.

The BIA's decision here may have been somewhat unusual, in both adopting the IJ's decision and offering its own discussion. More commonly, the BIA simply adopts the IJ's decision in a brief order or offers a self-contained decision of its own. But that should not permit us to disregard what the BIA said. We previously observed that "[i]f the BIA had adopted the IJ's decision while adding its own reasons, we would have to review both decisions." *Chand v. INS*, 222 F.3d 1066, 1072 n.7 (9th Cir. 2000). That should be our approach here. At a minimum, we should remand to the BIA in order to obtain clarification as to what its adverse determination was based upon.

As for the reasons individually discussed by the BIA (and thus recognized by the majority) in concluding that Chen's testimony was not credible, I concur with much of the majority's reasoning. I do not agree, however, that the suspicion regarding Chen's infrequent church attendance over the three years she lived on Guam is "speculation and conjecture" that was not reasonably supported by evidence in the record.

The majority understates the religious basis for Chen's asylum claim. She did more than attend a private church in China a few times. Her brief said that she "joined" a church and became a Jehovah's Witness. Her asylum application said that she "joined a church-affiliated organization" in China. Perhaps more importantly, her application (as translated) also specifically referred to religion as part of her motivation for entering the United States: "I heard that every US citizen enjoys the freedom of religion, human rights, and democracy in this beautiful US territory, Guam. Several friend of mine and me therefore came to our dream land, this US territory which provides freedom and is believing in God." [Errors in original translation.] Once she arrived in Guam, however, she attended church only twice in a period of more than three years. That behavior does seem inconsistent with Chen's claim. If she was truly drawn to the United States by the freedom of religion – which is what her application said – why didn't she do more to take advantage of that freedom after she got here? There are good answers that could be given in response to that question, but Chen did not provide one, either to the IJ or to us.

The majority says that failure to practice religion after entering the United States is no more suspicious than failure to continue political activity, but that analogy misses the mark. A person who flees her country to escape political

persecution may no longer be motivated to remain politically active, for she no longer lives under the government she opposed. But a person who says that she wants to live in the United States because of the freedom to worship can fairly be expected to actually worship after she gets here. Religious motivation, if sincere, will not disappear after the boundary line has been crossed. Chen professed a religious motivation. It was not unreasonable for the IJ to conclude that her failure to practice her religion while she lived on Guam cast doubt on the truthfulness of that professed motivation and thus on her credibility generally.

Chen had an opportunity at the immigration hearing to provide an explanation for the apparent inconsistency, if she had a good explanation. The government attorney explicitly raised the subject and elicited the testimony concerning her limited religious activities on Guam. The fact that her own attorney decided not to ask her for an explanation is not reason to ignore the inconsistency. The applicant bears the burden of establishing asylum eligibility. She gave reasons why she did not go to church on Saipan, but those reasons do not explain her failure to practice her religion on Guam. She gave no reasons for not attending religious services on Guam. Alternatively, she could have testified that in fact she was not devout and offered an explanation for what she put on her asylum application, but did not do that, either. Indeed, even on appeal Chen has

failed to provide any explanation – her brief only discusses why she did not go to church while she was on Saipan and does not say anything about her limited religious activity during her three years on Guam. Inconsistent testimony cannot be disregarded simply because the petitioner and her attorney elect not to offer an explanation for the inconsistency.

We should remand Chen's case to the BIA with directions to reconsider her eligibility for asylum, without precluding the possibility of another adverse credibility determination based upon the IJ's demeanor finding and the single identified inconsistency in her testimony. The fact that so many of the grounds cited by the BIA in support of an adverse credibility determination were incorrect leaves uncertainty as to whether the BIA would have reached the same conclusion if limited to those two bases. That is enough to justify remanding the case, as opposed to denying the petition and, in effect, affirming the BIA's decision.

It is surely not the case, though, that there is reason to have confidence in Chen's credibility. No reason has been given to disbelieve the IJ's adverse demeanor finding, and Chen never has explained why she cited freedom to worship as a reason to come to the United States and then failed to worship once she got here.

Nonetheless, the majority closes the door to those reasonable doubts and

requires the BIA on remand to accept Chen's credibility as a given. That result is no more supported by law than it is by logic. *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003), cited by the majority, does not support its refusal to remand for further consideration of the credibility issue. In that case there was no uncertainty as to the basis for the BIA's adverse credibility determination. In fact, in *He* we explicitly examined *both* the oral opinion of the IJ and the written decision of the BIA, something which the majority has refused to do here. Instead, we close our eyes to the IJ's adverse demeanor finding, based on the implausible inference that the BIA did not rely upon that demeanor finding. If there really is doubt about that, we should remand for clarification, not resolve the question ourselves.

I concur with the decision to remand, but dissent from the decision to preclude the BIA from addressing the credibility issue on remand.